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The American
Antitrust Institute

May 28, 2004

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Certification of Digital Output Protection Technologies and Recording Methods to be Used in Covered Demodulator Products;*
Certification of Digital Content Protection, LLC, MB Docket No. 04-61;
Certification of 4C Entity, LLC, MB Docket No. 04-62;
Certification of Digital Transmission Licensing Administrator, LLC, MB Docket 04-64;
Digital Broadcast Content Protection; MB Docket No. 02-230;
Notice of *Ex Parte* Communication

Dear Ms. Dortch:

This letter is submitted pursuant to Section 1.1206(b)(2) of the Commission's Rules relating to notice of a permitted oral *ex parte* presentation in the above-referenced proceedings. On May 27, 2004, Albert Foer and the undersigned, on behalf of the American Antitrust Institute ("AAI"), met with Susan Mort, Rick Chessen, Bill Johnson, Mike Lance and Steve Broeckaert of the Media Bureau, Alan Stillwell of the Office of Engineering and Technology, and Amy Nathan of the Office of Strategic Policy and Planning

At the meeting, the parties discussed the AAI's concern over the potential anticompetitive consequences of approving the above-referenced interim certifications as approved content protection technologies without sufficient pro-competitive regulatory safeguards. The AAI suggested that the present proceedings are unique because they involve the incorporation into regulations of technologies currently available through pre-existing licenses. The multiplicity of existing adopters for these technologies is not probative of the extent to which the terms of such licenses have been determined by competitive market forces. Since these licenses were not developed in the

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context of a formal standard-setting process nor under freely competitive circumstances, there is a need for the Commission's examination and oversight of the terms of the proposed licenses.

The AAI stressed that its concern was a matter of competition policy, rather than with actionable antitrust violations.

With respect to the proposed license terms, the AAI stressed the following points:

- The interoperability of multiple, competing content protection technologies is essential for the development of a competitive marketplace and user choice. The AAI stressed that technology licensors should not be permitted to exercise unfettered discretion in disapproving other technologies with which adopter products may interoperate. While alterations or modifications to a specification to accommodate interoperability should be left largely to the discretion of the parties, artificial and legalistic barriers to interoperability in the terms of the licenses should be prohibited. The AAI did not specify a mechanism for Commission to develop to avoid non-interoperability based on *de minimis* costs or pretextual grounds.

- The AAI questioned the justification for the joint offering of content protection technologies by horizontal competitors, particularly when the intellectual property is not disclosed so that no suitable evaluation of the competitive effect of such horizontal cooperation can be undertaken. The AAI referred to the Department of Justice Business Review Letter procedure, which is available for the clearance of proposed patent pools, and summarized the straight-forward conditions usually imposed by the DOJ on such patent pools. The AAI stressed that the Commission should ensure that the horizontal relationships involved in the 4C and 5C technology pools are pro-competitive, which requires disclosure of the underlying IP, inclusion of complementary technologies only, and the freedom of adopters to license technology from the cooperating parties individually rather than as an all-or-nothing blanket license. The AAI cautioned against setting the precedent of governmental approval of technology licensing by horizontal competitors in which the participants neither disclose their intellectual property rights nor take advantage of the DOJ's business review letter procedure. While the costs of such an analysis may be non-trivial, it is also likely that the benefits to consumers in the form of the facilitation of future innovation and competition will be non-trivial, as well.

- The AAI stressed that licenses should provide the firm assurance that license-administration will be the responsibility of an independent entity, or will take place within firewalls designed to ensure that proprietary and competitively sensitive information is not shared with founders in competition with adopters. The AAI also recommended that overly-broad reporting requirements, such as those that include business or product design planning, be prohibited.

- The AAI objected to the structure of the royalty-free non-assertion covenants in the proposed licenses, particularly as they affect adopters with large patent portfolios. The combination of the non-disclosure of the underlying intellectual property, the unfettered rights on the part of the founders to change the technology specification, and the royalty-free terms of any patent held by an adopter with does or may read on the specification creates an unreasonable risk for adopters and a strong disincentive to innovate on the specification or its implementation. Grant-backs and non-asserts should provide for RAND compensation for innovators whose patents may be "swept in" to the specification (or whose pre-existing patent may read on the specification), and disclosure of patents should be required to enable adopters to adequately evaluate the risks of the non-assertion covenants.

The AAI's letter of March 22, 2004 to FCC Chairman Powell, FTC Chairman Muris, Assistant Attorney General Pate, and Director General-InfoSoc Colasante of the European Commission was discussed. The AAI was queried on how the European approach in this area may differ from the approach of the U.S., and referred the parties to the basic principles of the EC Framework Directive (Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services), which prohibits content protection mechanisms that curtail user choice and interoperability, and the Copyright Directive (Directive 2001/29/EC of 22 May 2001), which prohibits content protection mechanisms that curtail certain enumerated fair use rights.

The AAI stressed the potential benefit of interagency cooperation with the Department of Justice Antitrust Division or the Federal Trade Commission with respect to the analysis of the competitive impact of its proposed regulations and interim certification approvals.

The AAI stressed that, in general, the non-disclosure of intellectual property rights often undermines the pro-competitive purposes of patents, of

cooperative standard-setting, and of the joint licensing of technology, and poses difficulties for the evaluation of whether such arrangements are, in fact, pro-competitive.

The attached summary and table, and AAI's brief in the matter of Rambus, Inc., currently pending before the FTC, were distributed at the meeting.

Please address any questions to the undersigned at (202) 415-0616.

Sincerely,

/s/

Jonathan L. Rubin, J.D., Ph.D.
Research Fellow

Counsel for the American Antitrust Institute

Attachments A, B

cc: Susan Mort
Rick Chessen
Bill Johnson
Mike Lance
Steve Broeckaert
Alan Stillwell
Amy Nathan